

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

MOTION TO SUPPRESS

The Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fourth Amendment to the U.S. Constitution, hereby moves this Honorable Court to suppress the fruits of all evidence seized from Mr. Fariz, his home and place of employment pursuant to the February 19, 2003 search warrant and as grounds in support would show:

1. On February 19, 2003, Hatem Naji Fariz and seven co-defendants were charged in a fifty-count indictment with multiple conspiracies and offenses including violations of the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the International Emergency Economic Powers Act (“IEEPA”). On that same day, Special Agent Kerry Myers, FBI, filed an application and affidavit for a search warrant to include Mr. Fariz’ home and place of business. Magistrate Case Nos. 8:03-M-77-MAP; 8:03-M-79-MAP; and 8:03-M-80-MAP. The affidavit in support of the search warrants frequently cross-references the Indictment as support for the necessary showing of probable cause. Myers Affidavit, ¶ 8.

2. The February 2003 indictment included allegations that Mr. Fariz discussed financial transactions with Abd Al Aziz Awda (“Awda”), a specially designated terrorist (“SDT”). Doc. 1, ¶ 236.

3. On September 21, 2004, the grand jury returned a superseding indictment against Mr. Fariz and eight co-defendants. The superseding indictment again alleges violations of the AEDPA and IEEPA. Doc. 636.

4. Significantly, the superseding indictment deletes the previous allegations tying Mr. Fariz to specially designated terrorist Awda. The deletion of these references is consistent with the government’s acknowledgment that they had erroneously identified an individual known as Abu Ahmed as Awda.

5. Special Agent Myers’ affidavit in support of search warrants includes numerous references to Abu Ahmed, cross-references the indictment, and then notes that Abu Ahmed is also known as SDT Abd Al Aziz Awda. The affidavit then describes the conduct attributed to Mr. Fariz concerning Awda to be illegal because of Awda’s designation. Myers Affidavit, ¶¶ 40, 57, 74, 76, 77, 79, 84 and 88.

6. The paragraphs outlined by the government accusing Mr. Fariz of conduct involving a Specially Designated Terrorist, having been acknowledged as erroneous, must be stricken from the affidavit and the affidavit must be evaluated for probable cause in their absence. *Franks v. Delaware*, 438 U.S. 154 (1978).

7. The remaining allegations of Special Agent Myers’ affidavit, as they relate to Mr. Fariz, fail to describe any acts, individually or in concert, to substantiate a finding

of probable cause in support of the search warrants issued against him.

8. Mr. Fariz is the sole defendant and search warrant target not identified as a Palestinian Islamic Jihad member in Agent Myers' introductory statements. Myers Affidavit, ¶ 8(e).

9. Paragraphs 53, 54, 58 and 86 of the affidavit are conclusory. The affidavit includes no support for these conclusions, and as such, they fail to establish probable cause.

10. Paragraph 41 describes a conversation between Mr. Fariz and defendant Ghassan Ballut wherein Mr. Fariz discusses the desire to "discipline" a local religious leader. A complete and accurate translation would demonstrate that Mr. Fariz was discussing a leader of his mosque and the man's lack of initiative. He describes the need to motivate the man by inserting a hot object into the man's anus. He reflects that he had done this years ago to a suspected collaborator while he was in the Middle East. This paragraph is expressly intended to allege violence in Mr. Fariz' past. The paragraph does not attempt to demonstrate any relevance to the instant charges because, in fact, none exist. The statements by Mr. Fariz were pure hyperbole arising out of his frustrations. The statements are not based in fact, and there are no allegations to that effect.

11. Paragraph 42 describes a phone call from Mr. Fariz to a known newspaper reporter wherein Mr. Fariz is said to correct the reporter's erroneous story attributing an attack to Hamas. Agent Myers can only speculate as to the particular attack in question. What's more, there is no allegation of complicity or a pre-existing knowledge of the

attack. The verbiage of this paragraph implicitly demonstrates a lack of knowledge on the part of Mr. Fariz. When read in concert with other conversations outlined in the affidavit, it is clear that Mr. Fariz' knowledge of attacks in the Middle East were based on news reports and word of mouth dissemination by Palestinians and their supporters in the United States.

12. Paragraphs 75, 78 and 81 discuss conversations regarding fund-raising efforts by Mr. Fariz. There are no allegations tying these efforts to any illicit activities. Other allegations of illicit fund-raising activities were supported only by the assertion that certain financial transactions involved SDT Awda, and those financial transactions were therefore illegal. As previously noted, the allegations regarding Awda have been acknowledged by the government to be erroneous. Those allegations that remain fail to establish even a modicum of probable cause.

13. Paragraphs 88 - 93 describe the "enterprise's" use of computers and the internet. The allegations offered to support probable cause related to Mr. Fariz are extremely limited. Paragraph 88 alleges that Mr. Fariz will be a Ph.D. candidate at USF's School of Computer Engineering. Myers Affidavit, ¶ 88(a). Paragraph 88 references a conversation between Mr. Fariz and Ghassan Ballut discussing Sami Amin Al-Arian's desire to buy a computer for Abu Tariq. *Id.* at ¶ 88(i). Paragraph 88 misidentifies Awda, and misrepresents the content of prior paragraph 65. *Id.* at ¶ 88(k). Paragraph 91 describes Mr. Fariz' use of email addresses. Paragraph 92 describes Mr. Fariz' employment at the offices of Dr. Ayman Osman and Mr. Fariz' use of computers, the

internet and the Arabic language.

Memorandum of Law

_____Mr. Fariz brings this Motion to Suppress on three separate and independent grounds. First, Mr. Fariz submits that the Affidavit for the search warrant was materially false or misleading. As a result, all evidence seized and all statements Mr. Fariz obtained on the date of the search must be suppressed. *See Franks v. Delaware*, 438 U.S. 154 (1978); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). Second, Mr. Fariz submits that all statements he made on the date of the search must be suppressed because they were the product of coercion, and not made by his own free will. Third, Mr. Fariz submits that the evidence seized must be suppressed because the warrants were executed in a manner that violated his Fourth Amendment rights.

In *Franks*, the Supreme Court asserted a constitutional prohibition against police officers using knowingly or recklessly false statements in support of a search warrant. *Franks*, 438 U.S. at 165-166. As the Court explained: “[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing . . . it is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true.” *Id.*

The Eleventh Circuit has extended the *Franks* holding to cases where perjury or recklessly false statements or omissions are made by a police officer in support of a warrant, although the rule is not applied to mere negligence. *See, e.g., Kelly v. Curtis*, 21 F.3d 1544 (11th Cir. 1994); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950 (11th

Cir. 1982); *United States v. Martin*, 615 F.2d 318 (5th Cir. 1980). In *West Point-Pepperell*, the Court held a warrant to be invalid where it was based on an officer's recklessly false statements and omissions. 689 F.2d at 959. *See also United States v. Clapp*, 46 F.3d 795, 799 (8th Cir. 1995) (requiring hearing where defense made preliminary showing that omissions could have affected the issuance of search warrant).

The Eleventh Circuit has held that “reasoning in *Franks* also applies to information omitted from warrant affidavits.” *Madiwale v. Savaiko*, 117 F.3d 1321, 1326 (11th Cir. 1997). “[W]hen facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself.” *Id.* at 1327 (quoting *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980)).

The mandate of *Franks* has not been diluted with any claimed good faith exception. “Suppression . . . remains an appropriate remedy if the . . . judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or could have known was false except for his reckless disregard for the truth.” *United States v. Leon*, 468 U.S. 897, 923 (1984). Moreover, in this Circuit, there is a recognized federal right to be free from those prosecutions which are procured through false or misleading information. *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988).

Mr. Fariz contends that the government at least recklessly misidentified Awda. The government used Mr. Fariz’ alleged conversations with Abu Ahmed as support for its theory that Mr. Fariz was providing support to the PIJ. By identifying Abu Ahmed as Awda, the government alleged a direct connection between Mr. Fariz and the alleged

spiritual leader of the PIJ. As of the date of the affidavit, however, the government knew that Abd Al Aziz Awda had not been affiliated with the PIJ since 1997. Doc. 683. The government at least recklessly omitted information from the search warrant affidavit that Awda was not involved in PIJ, and equally significantly, that Awda had specifically left the PIJ in order to work with Palestinian Authority, the recognized governing body of the Palestinian people. Doc. 683. Inclusion of this critical information may have prevented a finding of probable cause, since probable cause in this case was apparently premised on Mr. Fariz' alleged connection to Awda. *Madiwale*, 117 F.3d at 1327. *See also* Doc. 74 at 14 - 16. The fact that Awda was not affiliated with PIJ as of 1997 is also not consistent with the government's theory that Mr. Fariz supported the PIJ through his alleged communications with Awda in 2002. Therefore, the government also should have known that Abu Ahmed was not Awda. *See* Doc. 74 at 14 - 16.

Mr. Fariz submits that, absent the misstatements and omissions in the affidavit, there was insufficient probable cause for the issuance of a search warrant.

In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Franks, 438 U.S. at 156.

Mr. Fariz also seeks the suppression of any statements he is alleged to have made on the day of the search. Any statements were the result of the unlawful search, and

should be deemed inadmissible under the “fruit of the poisonous tree” doctrine. *See Wong Sun*, 371 U.S. at 487-88. *See also United States v. Davis*, 313 F.3d 1300, 1302 (11th Cir. 2002) (“Evidence seized after an illegal seizure should be suppressed as the “fruit of the poisonous tree.”).

In determining whether evidence is ‘fruit of the poisonous tree’ and, therefore, must be excluded, the relevant question is ‘whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’

371 U.S. at 487-88 (citation omitted).

In the instant case, it is clear that the police would not have obtained Mr. Fariz’s statements but for the unlawful search. There was no intervening “independent act of free will,” that even arguably separated Mr. Fariz’ statements from the search. The statements between these events therefore cannot be considered so “attenuated as to dissipate the taint” of the illegal detention. *Wong Sun*, 371 U.S. at 491. Therefore, Mr. Fariz respectfully requests that all statements he made (or is alleged to have made) on the date of the search be suppressed.

Additionally, Mr. Fariz submits that his statements must be suppressed because they were the product of coercion, and not the product of his own free will. The Fifth Amendment requires that no person “be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. In this case, however, Mr. Fariz was threatened with the loss of his children and his business if he did not tell the authorities what they

wanted to hear. Under the circumstances, it cannot be said that Mr. Fariz' statements were the product of his own free will. *See Arizona v. Fulminante*, 499 U.S. 279, 288 (1991) (court must consider whether defendant's will was "overborne in such a way as to render confession the product of coercion"). *See also United States v. Davis*, 21 F. Supp. 2d 979 (D. Minn. 1998) (describing as a "strong-arm tactic" officer's attempt to elicit confession by discussing potential loss of custody if defendant was found to have engaged in offense). Any statements made by Mr. Fariz as the result of the government's threats must be suppressed.

Even if the search warrant is found to be valid, the execution of the warrant violated Mr. Fariz' Fourth Amendment rights in that the items seized went far beyond the scope of the warrant. In determining whether a search and seizure was reasonable under all of the circumstances, the Court may consider "[s]uch things as the scope of the warrant, the behavior of the searching agents, the conditions under which the search was conducted, and the nature of the evidence being sought" *United States v. Schandl*, 947 F.2d 462, 465 (11th Cir. 1991) (quoting *United States v. Heldt*, 668 F.2d 1238, 1254 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982)).

Considering all of the circumstances, the search was unreasonable in that the agents seized numerous of Mr. Fariz' belongings which were not described in the search warrant, and which could not have been confused for anything described in the search warrant. For example, items seized during warrants executed as to Mr. Fariz' residence and offices include a simple calculator (as opposed to a scientific calculator having the

capacity to store data) (Bates no. 703470), a paper bag containing a small crystal ornament (Bates no. 703783), several beaded necklaces described by the government as “prayer beads” (Bates no. 703854), and a Valentine’s Day card drawn in crayon by Mr. Fariz’ son (Bates no. 703717). These are mere examples of many items that were illegally seized by the government. Mr. Fariz would request an evidentiary hearing to further address Mr. Fariz’ grounds for suppression.

Finally, Mr. Fariz incorporates any arguments to be made by other defendants regarding the 1995 searches of residences and offices to the extent that those searches resulted in evidence related to Mr. Fariz.

WHEREFORE, the Defendant, Hatem Naji Fariz, respectfully asks this Court to suppress all evidence seized and all statements made by him on the date of the search.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22th day of November, 2004, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ Kevin T. Beck
Kevin T. Beck
Assistant Federal Public Defender